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Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants,

vs.

PAUL FANNIN, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATEMENT AS TO JURISDICTION

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PRELIMINARY

This is an appeal from an order of the United States District Court for the District of Arizona, dated September 18, 1962, disimpaneling a previously convened three-judge district court based on an opinion that this is not that kind of case calling for the special statutory district court. [Tr. 11 (1-2); App. 47-48][1] The order appealed from for all

[1] Reference numbers appearing herein within brackets and preceded by "Tr." refer to pages of the typewritten transcript of record; numbers preceded by "App." refer to a separately bound printed appendix accompanying this statement.

practical purposes dismissed the case for want of jurisdiction of the statutory court and thus disposed of the case. It is, therefore, an appealable final order. (28 U. S. C. § 1253) This statement is submitted to show that this Court has jurisdiction of this appeal and that the federal question alleged in the first amended complaint is serious and substantial.

OPINION

The opinion of the district court is not reported. It appears in the transcript of record. [Tr. 11 (1-2); App. 47-48]

FEDERAL STATUTES INVOLVED

28 U. S. C. § 1253 reads as follows:

"Direct appeals from decisions of three-judge courts.

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.—June 25, 1948, ch. 646, 62 Stat. 928.

28 U. S. C. § 2281 reads as follows:

"2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such sta-

tute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."—June 25, 1948, ch. 646, 62 Stat. 968.

STATE STATUTES INVOLVED

Subsections 14, 15, 16 and 18 of Section 15-102 of the Arizona Revised Statutes specifying the powers of the State Board of Education, read as follows:

"The state board of education shall:

"14. Exercise general supervision over and regulate the conduct of the public school system.

"15. Prescribe and enforce a course of study in the common schools.

"16. Prescribe the subjects to be taught in all common schools.

. . . . . .

"18. Prescribe textbooks for the common schools, and shall prepare a list of three textbooks for each grade and each subject taught in the common schools for the selection by the school district of one book from such list for each student. The books so selected shall be purchased by the school district direct from the publisher as provided in this title. Textbooks selected pursuant to the provisions of this title shall not be changed during the next five years."

Section 15-305 of the Arizona Revised Statutes, defining the duty of pupils, reads as follows:

"A. Pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers and the governing board.

"B. Continued open defiance of authority or habitual profanity and vulgarity, constitute good causes for expulsion."

Subsection A, paragraph 2, of Section 15-442 of the Arizona Revised Statutes, specifying the powers of the school trustees, reads as follows:

> "A. The board of trustees shall: . . .
>
> "2. Enforce the courses of study and select all textbooks used in the schools from the multiple lists determined and authorized by the state board of education pursuant to paragraph 18 of section 15-102 . . ."

Subsection B, paragraph 1, of Section 15-442 of the Arizona Revised Statutes reads as follows:

> "B. The board may:
>
> "1. Expel pupils for misconduct."

Subsection B of Section 15-1031 of the Arizona Revised Statutes reads as follows:

> "B. The state superintendent of public instruction shall prepare for use in the public schools a program providing for a salute to the flag and other patriotic exercises, as meet the requirements of the different grades. He shall also make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day, Flag day and other legal holidays of like character."

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section one of the Fourteenth Amendment to the United States Constitution provides:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

I.

Where appellants allege that the State Board of Education, acting under Sections 15-402 (14), (15), (16) and (18), Arizona Revised Statutes, has established the National Anthem ceremony as a part of the course of study in all elementary schools by prescribing for use of students the songbook containing it, the ceremony according to universal custom requiring all persons to stand for it, which the appellants' children refused to do because of conscientious religious objections, resulting in their expulsion from Pinetop Elementary School by the school trustees under Sections 15-305 and 15-442 of the Arizona Revised Statutes, does such action of the state board carried out by the school trustees constitute action by state officials under state statutes, the enjoining of which should require a statutory three-judge district court (28 U. S. C. §§ 2281 and 2284) and give this Court jurisdiction under 28 U. S. C. § 1253?

II.

Where the state action described in the above question is alleged to have deprived the appellants of their right of freedom of religion is there a substantial federal constitutional question involved as to whether the statutes, as construed and applied (1) establish a religion, and (2) deprive appellants of freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Appellants filed a complaint on February 19, 1962, in the United States District Court for the District of Arizona under the Civil Rights Act to redress the deprivation of their rights of freedom of religion and conscience by the appellees under the Arizona statutes described in the complaint which were alleged to be unconstitutional as construed and applied. [Tr. 1 (1-18)]

The prayer for relief asked the court to call a statutory three-judge district court to hear the case. [Tr. 1 (16-17, 18)] The Chief Judge of the Ninth Judicial Circuit on April 14, 1962, expressing doubt ordered a three-judge statutory district court impaneled. [Tr. 2; App. 42-43] On May 29, 1962, the deposition of the Arizona State Superintendent of Public Instruction was taken. [Tr. 3] The appellants on June 25, 1962, filed their first amended complaint. [Tr. 4 (1-22); App. 1-22]

Jurisdiction of the district court was invoked by 28 U. S. C. §§ 1331 and 1343 and 42 U. S. C. §§ 1983, 1985 (3) and 1988. [Tr. 4 (1-2); App. 1-2]

The duty of the State Board of Education and of the State Superintendent of Public Instruction, its chief executive officer, to regulate and prescribe the courses of study, textbooks and songbooks was alleged. [Tr. 4 (2); App. 2] The duty of the trustees of the Pinetop Elementary School to enforce the statutes involved and the policies and orders of the State Board of Education and its chief executive officer, the State Superintendent of Public Instruction, is alleged. [Tr. 4 (2-3); App. 2-3]

The conscientious religious objections of appellants to standing for the National Anthem are alleged to be not contrary to the "welfare of the state." [Tr. 4 (4); App. 4]

The statutes involved are set forth in paragraph 10 of first amended complaint. [Tr. 4 (5-8); App. 5-8, 22] It is then alleged that the state board prescribed a course in music and singing for the rural elementary schools of the

state, including the Pinetop school by issuing a songbook to be used by all students at the school music assemblies. [Tr. 4 (8); App. 8] The songbook is said to contain the National Anthem, and as a part of the course of study students are required to stand for the singing or playing of the National Anthem. [Tr. 4 (9); App. 8] It was alleged that the singing from the book prescribed by the state board constituted a regulation of the State Board of Education. [Tr. 4 (9); App. 8] The Pinetop board is obliged by the statute and the regulation of the state board to have the students stand for the National Anthem. [Tr. 4 (9); App. 8]

The National Anthem ceremony in effect at the Pinetop school "pursuant to the orders of the state board of education" on September 29, 1961, is alleged. [Tr. 4 (9-10); App. 9] The National Anthem was played on that date in music assembly in the school and Daniel Mark Sheldon, age 12, Merle William Wingo, age 14, and Jere Bruce Wingo, age 13, refused to stand as demanded by the principal, who ordered them to leave the school, it was alleged. [Tr. 4 (10); App. 9] Efforts of the parents to get the boys reinstated and excused are alleged. [Tr. 4 (10); App. 10] The Pinetop school officials in expelling the boys, it is alleged were acting as agents for the state board in the enforcement of the course of study. [Tr. 4 (11); App. 10] It is alleged that the chief executive officer of the state board later specifically ratified the expulsion of the appellants' boys. [Tr. 4 (11); App. 10]

It is alleged that the orders of the state board prescribing the songbook, the singing of the National Anthem and the standing for it constituted state action and construction of the statutes so as to make them "unconstitutional, as construed and applied . . . as hereinafter specifically alleged." [Tr. 4 (11); App. 10] Failure of attempts to provide private education for the boys is alleged. [Tr. 4 (12); App. 11] Threats to expel other children of Jehovah's Witnesses in many other schools

throughout the state for similar conduct are also alleged. [Tr. 4 (12-14); App. 11-13] Great and irreparable injury is alleged. [Tr. 4 (15-16); App. 14] Lack of adequate remedy at law is also alleged. [Tr. 4 (16); App. 15]

The various statutes, the "orders, policies, programs or regulations" of the state board "requiring standing for the National Anthem ceremony are unconstitutional, null and void, as construed and applied," it is alleged, because they "conflict with the First and Fourteenth Amendments" in six particulars. [Tr. 4 (16-17; App. 15-16] The absence of any administrative remedy and the lack of need to exhaust any remedy is shown. [Tr. 4 (18-20); App. 17-18]

The first amended complaint prays for an interlocutory injunction and for a final decree restraining the enforcement of the statute, as construed and applied, to deprive appellants of their constitutional rights. [Tr. 4 (20-22); App. 18-21]

The appellees moved to dismiss and for a summary judgment. [Tr. 5 (1-5); App. 27-28] Attached to the motion is an opinion of the County Attorney of Coconino County, concurred in by the Attorney General of Arizona, which provides that children of Jehovah's Witnesses "stand, but not sing, while other students were standing and singing the National Anthem." [Tr. 5 (3); App. 30, 33-36] The fourth trial amendment to the first amended complaint alleged that the opinion has been circulated by the state board and the state superintendent to the entire elementary school system of Arizona as the policy to be enforced against students who were Jehovah's Witnesses. [Tr. 10 (1-3); App. 25-26] The court did not rule on the motion to amend the complaint but "accepted them as offers of proof," and the fourth trial amendment and the other amendments were filed. [Tr. 11 (2); App. 46, 48]

The case on August 8, 1962, was ordered fixed for pretrial conference on September 17, 1962, and for trial on

September 18, 1962. [Tr. 19 (2); App. 51] The case came on for hearing before a properly constituted three-judge district court on September 17, 1962. [Tr. 19 (2); App. 51] The question of whether this is a proper case for a three-judge district court was argued. [Tr. 12 (1-44); App. 43-45] The court ordered that this was not a proper case for three judges. [Tr. 11 (1-2, 13 (1-4), 19 (3); App. 46-47, 47-48, 51-53] The order was entered on September 18, 1962. [Tr. 41 (2); App. 53] Appellants filed their notice of appeal on September 24, 1962 [Tr. 15 (1-3), 19 (3)] For good cause shown the time for filing the transcript of the record, docketing the case in this Court and the filing of the jurisdictional statement was extended to January 21, 1963, by an order entered on November 16, 1962. [Tr. 18, 19 (4)] The case has been docketed in this Court within the extended time.

ALL QUESTIONS RAISED ARE SUBSTANTIAL

Discussion of Substantiality of the Questions

I.

Where appellants allege that the State Board of Education, acting under Sections 15-102 (14), (15), (16) and (18), Arizona Revised Statutes, has established the National Anthem ceremony as a part of the course of study in all elementary schools by prescribing for use of students the songbook containing it, the ceremony according to universal custom requiring all persons to stand for it, which the appellants' children refused to do because of conscientious religious objections, resulting in their expulsion from Pinetop Elementary School by the school trustees under Sections 15-305 and 15-442 of the Arizona Revised Statutes, such action of the state board carried out by the school trustees constituted action by state officials under state statutes, the enjoining of which required a statutory three-judge dis-

trict court (28 U. S. C. §§ 2281 and 2284) and gave this Court jurisdiction under 28 U. S. C. § 1253.

The complaint alleges that the National Anthem[2] ceremony was prescribed by the state board as a part of the course of study for elementary schools in Arizona. [Tr. 4 (2-3, 8-9); App. 2-3, 8-9] It is also alleged that this was an official order or regulation of the board by designation of the songbook containing the National Anthem. [Tr. 4 (8-9); App. 8-9] The refusal of appellants' children to stand and their subsequent expulsion was alleged. [Tr. 4 (9-10); App. 9] The action of the state board in prescribing the National Anthem ceremony and the school trustees in carrying it out is alleged to be state action and to constitute state construction of the various statutes involved so as to make them unconstitutional. [Tr. 4 (11); App. 10] All the statutes and the "orders, policies, programs or regulations" made by the state board under the statutes "are unconstitutional, null and void, as construed and applies . . . because they conflict with the First and Fourteenth Amendments to the United States Constitution" in six particulars set forth in paragraphs 25 and 26 of the amended complaint. [Tr. 4 (16-17); App. 15-16]

The allegations specifically show the action of "state officials" and not "local officials" is directly involved and not incidentally. The unconstitutionality of the specified state statutes and of the orders of the state board are also directly drawn in question. The statute (28 U. S. C. § 2281) calls for a three-judge district court when the complaint for an injunction claims that "an order made by an administrative board or commission acting under state statutes" is involved.

Our challenge to the constitutionality is not confined to the order but the complaint extends it to the statutes, as construed and applied. This alone requires a three-

[2] The Star Spangled Banner is made the National Anthem by Congress which also says that when played "all present should stand and face toward the music."—36 U. S. C. §§ 170, 171.

judge district court. (*Query v. United States*, 316 U. S. 486, 489 (1943); *Stratton v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10 (1930); *Kesler v. Department of Public Safety*, 369 U. S. 153, 155-156 (1962); *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715-716 (1962).

Three-judge district courts have been required on similar allegations in *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434 (1926); *Sterling v. Constantin*, 287 U. S. 378, 393, 397 (1932); *Louisville & Nashville Railroad Co. v. Greene*, 244 U. S. 522, 527, 528, 530, 531 (1917); *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 35-36 (1907); *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390 (1894); *Greene v. Louisville & Interurban Railroad Co.*, 244 U. S. 499, 506-508 (1917).

Even if the statute had not been challenged at all but there was merely a charge that the order of the state board establishing the National Anthem ceremony was challenged without an attack on the underlying statute there still would be required a three-judge district court. The Court has held that a challenge to the constitutionality of an order made by an administrative agency is sufficient to require a three-judge district court. (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 292 (1923); *Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 318 (1926); *Herkness v. Irion*, 278 U. S. 92, 93-94 (1928); *American Federation of Labor v. Watson*, 327 U. S. 582, 591-595 (1946); *Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341, 343 (1951)) The Act of Congress providing for the three-judge court includes "an order made by an administrative board or commission acting under state statutes." (28 U. S. C. § 2281) The National Anthem ceremony for the elementary schools of Arizona was expressly and solely established by the action of the state board in ordering the use of the songbook as a part of the course of study as alleged in the complaint. [Tr. 4 (8-9); App. 8]

The state officials, the board and superintendent, were not mere nominal parties. If they were, then the three-

judge statute would not be satisfied. (*Wilentz* v. *Sovereign Camp, W. O. W.*, 306 U. S. 573, 579-580 (1939)) The promulgation of the National Anthem order for the elementary schools is alleged to be and is, as a matter of fact and law, "directly attributable to the statute."—*Ex parte Bransford*, 310 U. S. 354, 361-362 (1940).

The statutes of Arizona place the government of all the schools of the state in the State Board of Education. Section 15-102, Arizona Revised Statutes, subsections 15 and 16, specifically commands the board to "prescribe and enforce" the course of study "for all schools" and to prescribe "the subjects to be taught in all common schools." Subsection 18 of the same statute requires that the board prescribe the "textbooks for the common schools." The action of the state board in the issuance of the songbook containing the National Anthem was to "prescribe and enforce" it in all schools, including Pinetop Elementary School.

It was not necessary for the legislature to spell out the National Anthem ceremony in the statute. The words "prescribe and enforce" the course of study and the textbooks are sufficient to make the issuance of the list of books including the songbook containing the National Anthem an order or regulation of the state board so as to require a three-judge court. The issuance of the list containing the songbook by the state board constituted action by state officials and not mere local officials.

The National Anthem carried with it the requirement of standing. (36 U. S. C. §§ 170, 171) See also the deposition of the state superintendent, who is the executive officer of the state board. [Tr. 3 (6)] He said it was common practice for the National Anthem to be played in the schools of Arizona and that the student stand at all times when the National Anthem is sung. [Tr. 3 (17-18)] He said that this practice would be one of the "other patriotic exercises" mentioned for the state superintendent to arrange in the elementary schools in Section 15-1031 of the Arizona Re-

vised Statutes. [Tr. 3 (18)] He also said that the refusal of the children to stand justified expulsion by Pinetop school officials. [Tr. 3 (26, 31-32)]

The requirement in the schools of Arizona that students stand for the National Anthem did not originate with the local school board. The local board is a mere agent of the state board in ordering the standing for the National Anthem, as is alleged in the first amended complaint. [Tr. 4 (2-3, 8-9, 11); App. 2-3, 8-9, 10] The state board, which has general control of the schools and specific authority to prescribe songbooks and order their use, is the board that is primarily responsible. The local school board is merely the "police officer" acting for the "governor", the head of the state board. The local board performs mere agency functions for the state board. The acts of the school trustees become the acts of the state board. [Tr. 4 (2-3, 8-9, 11); App. 2-3, 8-9, 11]

The trial court, at the oral argument, placed emphasis upon the absence of any express language in the statute and an express written order of the state board as making it a local school board matter and not a state board ruling. [Tr. 12 (16-17); App. 43-44] The presiding judge of the district court, however, later said "we are not disturbed by the fact that there was no written requirement of standing." [Tr. 12 (20); App. 44] He sharpened the issue merely by adding: "It is simply whether, instead of a governor taking action on behalf of the state, purportedly, it is the circumstances that we have a school district taking action on behalf of a school district." [Tr. 12 (20); App. 44] He went on to say: "we do not have a situation where this action would result in uniform state policy or action throughout the state." [Tr. 12 (20); App. 44]

This comment of the presiding judge, for the district court below, ignored the allegations of the complaint about the action of the state board in "prescribing" the songbook with the National Anthem in it and "enforcing" such order by circulation of the list of books with the songbook on

the list to the local school boards, whose mandatory duty under the statute is to use the songbook. (Section 15-442 (A) 2 of Arizona Revised Statutes) [Tr. 4 (7, 11), 7; App. 7, 10, 22] The matter must be determined by the allegations of the complaint.—*Ex parte Poresky*, 290 U. S. 30, 32 (1933).

The mere fact that some school boards have chosen not to enforce the statute and order against Jehovah's Witnesses by requiring a uniform standing in schools throughout the state is immaterial. A mere excessive exercise of authority or failure to exercise the mandate of a statute by state or local officials does not make it a case for only one judge. (*Sterling* v. *Constantin*, 287 U. S. 378, 393 (1932)) It is, nevertheless, a case for three judges.

The statutes involved here and the order of the state board in prescribing the course of study and enforcing it so as to require the National Anthem ceremony do not constitute a law of local nature such as a local ordinance or an isolated regulation of a local school board. (*City of Cleveland* v. *United States*, 323 U. S. 329 (1945)) The local Pinetop school board was performing a function of "statewide concern" in enforcing the National Anthem ceremony "prescribed" by the state board when it issued the list of books containing the songbook. None of the statutes is local in effect. They are statewide in scope. The order of the state board prescribing the songbook was not local in effect. It affects all the elementary schools throughout the state. The case does not involve only a local statute or order.

The action of the Pinetop school in ordering the National Anthem ceremony was not a mere discretionary act of the board of trustees that was local in nature. It was commanded by this language of the legislature of Arizona in a statewide statute: "Enforce the courses of study and select all textbooks used in the schools from the multiple lists determined and authorized by the state board . . ." [Tr. 4 (7); App. 22] The expulsion order for the three boys was specifically authorized by statute which, under the

facts, is alleged to be unconstitutional. [Tr. 4 (7-8, 11, 16-17); App. 7, 10, 15-16]

The order of expulsion by the Pinetop board was merely an ancillary order to enforce the "courses of study" order of the state board. This order of the state board is the basic thing that set in motion the chain of events that resulted in the ceremony, the order to stand and the expulsion because of the refusal to stand. It was a statewide order. It was not a mere local order or ordinance of the county superintendent or the local Pinetop board. The prayer to enjoin it required a statutory three-judge district court, regardless of the ancillary action of the local Pinetop board to enforce it.

What Judge Parker said in *Briggs* v. *Elliott*, 98 F. Supp. 529 (E.D. S.C. 1951), is applicable here as well as the holding that such case was a proper three-judge case. He said that the local school trustees "as officers of the state, have control of the schools in the district." See also *Davis* v. *County School Board*, 103 F. Supp. 337 (E.D. Va. 1952). Compare *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W.Va. 1942), Judge Parker, also a three-judge district court, where the flag salute statute and regulation were declared to be unconstitutional.

In *City of Cleveland* v. *United States*, 323 U.S. 329, 332 (1945), local officials were held to be officers of the state when enforcing statewide policy; see also *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd per curiam, 352 U.S. 903, where bus drivers were held to be officers of the state in that they had the authority to enforce state policy; *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 94 (1935), where it is said: "Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves."

The state board and school board can be restrained by an injunction against their officers. Even the local school board officials must be considered state officers for purposes of three-judge court jurisdiction when they enforce statewide policy. Even Dobbs Houses, Inc., as lessee of city property on which it is operating a public accommodation also has been held to be an agency of the state within the contemplation of the Supreme Court's decisions construing the Fourteenth Amendment's restraints.—*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

Appellants recognize that a number of district courts have granted injunctions against the enforcement of obviously unconstitutional state school segregation statutes while sitting as single judge courts. See *Gray* v. *Board of Trustees of the University of Tennessee*, 100 F. Supp. 113 (E.D. Tenn. 1951), dismissed as moot, 342 U. S. 517, and see discussion of this point in *Davis* v. *County School Board*, 142 F. Supp. 616, 617 (E.D. Va. 1956), *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, mandamus den. 351 U. S. 948, aff'd 242 F. 2d 156 (5th Cir.), cert. denied 354 U. S. 921. See also cases in annotation, 4 L. Ed. 2d 1931, 1958, Note 1.

The policy considerations in terms of efficient judicial administration suggested by those decisions are perhaps best expressed by *Phillips* v. *United States*, 312 U. S. 246, 250, 251, in which Mr. Justice Frankfurter pointed out that the requirement of three judges "entails a serious drain upon the federal judicial system" and that the appealability of three-judge court orders directly to the Supreme Court places a strain upon the docket of the Supreme Court.

It may be, therefore, that notwithstanding the language of §§ 2281-2284, the Court appropriately might construe the three-judge court act to permit a single judge district court to enjoin the enforcement of a clearly unconstitutional statute as suggested in the segregation suits cited above. On the other hand, while single judge action in such cases may be permissible for reasons of sound judicial adminis-

tration, where three judges actually do take jurisdiction in a case involving an injunction against the enforcement of a state statute based on its constitutionality such jurisdiction properly has attached under the very terms and policy of 28 U. S. C. §§ 2281-2284.

Appellants' position therefore is this: the case falls within the language and policy of 28 U. S. C. §§ 2281-2284. As such, the three judges who took and exercised jurisdiction lawfully possessed such jurisdiction and they unlawfully abdicated when the order of September 18 was made. [Tr. 11 (1-2); App. 47-48] Although an alternative construction of 28 U. S. C. §§ 2281-2284 might be justified in the light of pressing problems of judicial administration—a single judge cannot act once three judges take jurisdiction of the case and they cannot escape it, but their order of abdication is appropriately reviewable by this Court under 28 U. S. C. § 1253.

Wherefore, it is respectfully submitted that this is a case for a statutory three-judge court.

II.

Where the state action described in the above question is alleged to have deprived the appellants of their right of freedom of religion there is a substantial question involved as to whether the statutes, as construed and applied (1) established a religion, and (2) deprived appellants of freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution.

The National Anthem has words of prayer, adoration and reverence to the Deity. See *Encyclopedia Americana*, Vol. 25, p. 491 (1956 ed.). To stand for the National Anthem is considered by appellants an act of religious worship. To stand for it is an affirmation that the one standing joins in the words of such National Anthem. To Jehovah's Witneses the very act of standing for the National Anthem

constitutes a religious act. The three Hebrew children, Shadrach, Meshach and Abednego, set the precedent for Jehovah's Witnesses when they refused to bow down at the sound of the musical instruments when played as a patriotic-religious piece of music throughout the land at the order of King Nebuchadnezzar of ancient Babylon. (Daniel 3: 13-28) The three Hebrew children had conscientious scruples against bowing down. This was based on their religious training as faithful servants of the Almighty God Jehovah.

In this case, instead of the children being required to bow down, the reverse is required. Instead of bowing down from a standing position the children at Pinetop have been required to stand up. There is absolutely no difference whatever from a religious standpoint between bowing down while standing and standing up from a sitting position. The change of bodily position is a mere act of obeisance on the part of the person making the change of position.

It may be argued that the act of standing is not a religious act. This argument cannot stand. The Constitution of the United States guarantees to the appellants and their children the right to hold it to be a religious act. Their discretion and judgment cannot be challenged or rejected by the State of Arizona or by the courts.—*United States* v. *Ballard*, 322 U. S. 78, 86-88 (1944).

It has been pleaded that the belief that standing is prohibited by the Bible is unreasonable. But that contention has never been sustained. It is not within the competency of the courts to say what is or what is not reasonable in reference to religious beliefs. See *Reynolds* v. *United States*, 98 U. S. 145 (1878). In the course of dictum, the Court quoted from the Virginia Statute for Religious Freedom, as follows: " 'that to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty.' "

This entire matter is controlled by *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943),

affirming 47 F. Supp. 251 (S.D. W.Va. 1942). These opinions show beyond doubt that it is beyond the authority of any official, state or federal, judicial, legislative or executive, to interfere in the field of religion. There is no difference between refusing to salute the flag and refusing to stand for the National Anthem. It would be a waste of the Court's time to argue extensively that the *Barnette* decision is applicable. It is *per se* applicable. The citation of these two opinions is sufficient. It would be merely gilding the lily to say more about them.

Footnote 21 of the opinion of Mr. Justice Black in *Engel v. Vitale*, 370 U. S. 421, (1962) at page 435, is applicable. Mr. Justice Black for the Court said that the singing of "officially espoused anthems which include the composer's professions of faith in a Supreme Being" does not constitute an establishment. The Court through Mr. Justice Black was there speaking by way of dictum that the singing of anthems that did not involve compulsion was not the establishment of a religion. But one cannot gainsay the overall tenor of the opinion in that case is to the effect that the compulsory singing of the National Anthem would be unconstitutional.

Even the New York daily prayer that was declared unconstitutional in that case, which was not compulsory and excused any objecting pupil from participation, was held to be unconstitutional. The language of Mr. Justice Black by way of dictum in footnote 21 seems to be for the purpose of saving the National Anthem from the anathema of the Court's opinion.—*Engel v. Vitale*, 370 U. S. 421, at page 435.

There can be no doubt that the compulsory standing for the National Anthem is unconstitutional. The concurring opinion of Mr. Justice Douglas (370 U. S. at pages 437, 439) states concerning the prayer at the opening of the Supreme Court as follows: "That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need

recite the New York prayer." In the event that the compulsory standing for the National Anthem is approved then it must be held that the compulsory standing therefor constitutes a state establishment of religion contrary to the disestablishment clause of the First Amendment to the United States Constitution, which is carried forward against the State of Arizona by the Fourteenth Amendment to the United States Constitution.

It is respectfully submitted that the commandment of the school authorities of Arizona that children of Jehovah's Witnesses stand for the singing of the National Anthem, their refusal to so stand, and the exclusion of such students because of their conscientious refusal constitute a construction and application of the statutes appearing under Title 15 of the Arizona Revised Statutes on the subject of education so as to make them unconstitutional because (a) they abridge the rights of the appellants to freedom of worship and religion contrary to the First and Fourteenth Amendments to the United States Constitution and (b) they constitute an establishment of religion as construed and applied contrary to the First and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons above stated, this Court should conclude and order that the questions involved are substantial and of nationwide public importance so as to warrant the noting of jurisdiction. Then the case should be set down for hearing and the questions resolved in due course of time and procedure.

Respectfully submited,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellants

December, 1962

CERTIFICATE OF SERVICE

I, Hayden C. Covington, counsel for appellants in the above cause, do hereby certify that proper service of the foregoing statement as to jurisdiction has been made in compliance with Rule 33 of the Rules of this Court.

I have deposited in a United States post office in the City of New York with airmail postage thereon fully prepaid—

(1) A sealed package containing five copies thereof addressed to Robert W. Pickrell, Attorney General of Arizona, State Capitol Building, Phoenix, Arizona; and

(2) A sealed package containing five copies thereof addressed to Fred Wilson, County Attorney of Navajo County, Holbrook, Arizona;

addressees above being counsel in the court below for all appellees.

HAYDEN C. COVINGTON

Dated at Brooklyn, New York.
December , 1962.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants,

vs.

PAUL FANNIN, et al.,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPENDIX

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellants

Supreme Court of the United States

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APPEAL FROM UNITED STATES DISTRICT COURT
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** The order designating judges appears in a supplemental transcript certified by the court below.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Civil No. 749 Prescott Division

GEORGE W. SHELDON, PATRICIA RUTH SHELDON, MERLE WALLACE WINGO and BETTY MAE WINGO,

Plaintiffs,

vs.

PAUL FANNIN, W. W. DICK, RICHARD A. HARVILL, LAWRENCE J. WALKUP, G. HOMER DURHAM, CHARLES BURTON, BESSIE KIDD BEST and WALDO M. DICUS, as Members of the State Board of Education of the State of Arizona, and Such BOARD, W. W. DICK, as Superintendent of Public Instruction of the State of Arizona, FRANK CROSBY, VERA MATTHEWS and A. L. PENROD as Members of the Board of Trustees of Pinetop Elementary School, Pinetop, Arizona, and Such BOARD,

Defendants.

FIRST AMENDED COMPLAINT

TO SAID HONORABLE COURT:

Now come the above-named plaintiffs, with leave of Court having been first had and obtained, and file this their first amended complaint and still complain of the above-named defendants, and for a cause of action would show:

1. Jurisdiction is based upon existence of a federal question irrespective of the amount of money involved, in that this action arises under the Constitution and laws of the United States and involves purely and solely civil rights under and by virtue of the Civil Rights Act of 1871 (28 U.S.C. § 1343; 42 U.S.C. §§ 1983, 1985(3) and 1988) because this is an action brought to redress the deprivation

of civil rights by officials of the State of Arizona acting under color of statutes and regulations of a state. The Court also has jurisdiction by virtue of 28 U.S.C. § 1331, in that the cause of action arises under the Constitution and laws of the United States and that as to each person for whom this action is brought the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000.00.

2. All the plaintiffs are citizens of the United States of America and resident citizens of the State of Arizona.

3. Each individual defendant is a resident citizen of the United States of America and of the State of Arizona, and at all times herein complained of acted in his official capacity. The defendant-boards are agencies of the State of Arizona. The said state board and the said state superintendent, either acting separately or jointly, have the general supervision over the enforcement of programs, rules and regulations prescribed by them for the use of textbooks and songbooks and the conduct of all public schools within said state. The said superintendent has been charged by statute with the specific authority to prepare for use of all schools programs for patriotic ceremonies therein. That the said state board of education has specific authority to regulate and prescribe the course of study and the textbooks used by all of the public schools for their course of study during each school term. That the said state board of education also has authority to ascertain that all school laws are enforced and exercise general supervision over and regulate the conduct of the entire public school system of Arizona. The said board also has authority to delegate to executive officers of the board the execution of policies decided upon by the said board. That the said state superintendent is the chief executive officer of the said state board directed to carry out all of the purposes and policies of the said state board. That the defendant Pinetop board and its trustees have jurisdiction over the said Pine-

top Elementary School to carry out the mandate of the statutes of Arizona and the programs, rules and regulations of said state board and state superintendent. That the individual defendants and all the other officials and teachers of the various public schools of said state are agents, servants and employees of said state and said state board and have acted and will continue to act in their official capacities for the state and said state agencies and the Pinetop Elementary School Board in the enforcement of all said programs, rules and regulations.

4. Plaintiffs and their children of compulsory school age are Jehovah's Witnesses and bring this action for themselves individually and as a class action for the use and benefit of their children and for all other of Jehovah's Witnesses and their children of compulsory school age throughout the entire State of Arizona.

5. That Jehovah's Witnesses are an unincorporated body of followers of Jesus Christ who are entirely devoted to Almighty God Jehovah and who are diligent and faithful in carrying out the commands of God as recorded in the Bible. Each of them is in a covenant with Almighty God to obey his will and by the terms of which covenant they are required to give witness to the name, honor and majesty of Almighty God Jehovah, his Kingdom and the new world. Jehovah's Witnesses accept the Bible as the Word of Almighty God and conscientiously believe that a failure to obey the precepts and commandments laid down therein will in due time result in their eternal destruction at the hand of Almighty God. Plaintiffs, their children and all other of Jehovah's Witnesses sincerely and honestly believe that the act of participating in the National Anthem ceremony or singing the National Anthem or standing for it contravenes the law of Almighty God.

6. To stand for said ceremony means to plaintiffs and their children, in effect, to agree to it and endorse it as a religious rite or political ceremony contrary to the reli-

gious objections of the plaintiffs and such children. That by reason of the above and foregoing each and all of the plaintiffs and all of the persons for whom they sue have sincere and conscientious religious objections to standing for the National Anthem that are not contrary to public morals, public policy or the welfare of the state.

7. That plaintiffs and all other of Jehovah's Witnesses for whom this action is brought at all times endeavored to instruct and inform their children of the truths set forth in the Word of God, the Bible, which include the objection to their standing for the National Anthem ceremony. They desire to educate their children in the public schools of Arizona and rear them as upright and sincere followers of Jesus Christ, all as it is their right, privilege and duty to do; that said children have been so instructed from an early age and are now and have been at all times material hereto sincere believers in the faith of Jehovah's Witnesses supported by the Bible and have faithfully endeavored to obey such, including the aforesaid objection to standing for the National Anthem ceremony.

8. Plaintiffs are loyal to the United States and the State of Arizona and willingly obey its laws, but they nevertheless believe that their first and highest duty is to their God and his commandments and laws, and that as true followers of the Lord Jesus Christ they have no alternative except to obey God's commandments and laws and to follow their conscientious convictions and religious objections to standing for the singing of the National Anthem.

9. Plaintiffs and others of Jehovah's Witnesses for whom this action is brought have many children who are of compulsory school age and bound by law to attend the various public schools throughout the said state.

10. The statutes involved in this action are:

(a) The statute prescribing the duties and responsi-

bilities of the state board of education is Section 15-102 of the Arizona Revised Statutes, which reads as follows:

"§15-102. Powers and duties

"The state board of education shall:

* * * * *

"3. Make rules and regulations for its own government.

"4. Determine the policy and work undertaken by the board.

"5. Appoint, on the recommendation of the superintendent of public instruction, executive officers, deputies, clerks, and employees of the board.

"6. Make rules and regulations for the government of the executive officers of the board.

"7. Prescribe the duties of and direct the work of the executive officers of the board when not prescribed by law.

"8. Delegate to the executive officers of the board the execution of policies decided upon.

* * * * *

"12. Ascertain that the school laws are properly enforced.

* * * * *

"14. Exercise general supervision over and regulate the conduct of the public school system.

"15. Prescribe and enforce a course of study in the common schools.

"16. Prescribe the subjects to be taught in all common schools.

* * * * *

"18. Prescribe textbooks for the common schools, and shall prepare a list of three textbooks for each grade and each subject taught in the common schools

for the selection by the school district of one book from such list for each student. The books so selected shall be purchased by the school district direct from the publisher as provided in this title. Textbooks selected pursuant to the provisions of this title shall not be changed during the next five years."

(b) The statute prescribing the duties and responsibilities of school children attending public schools in Arizona is Section 15-305, Arizona Revised Statutes, which reads as follows:

"A. Pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers and the governing board.

"B. Continued open defiance of authority or habitual profanity and vulgarity, constitute good causes for expulsion."

(c) The statute granting the power to the board of trustees of each school board in the State of Arizona to make rules and regulations for the conduct of children is Section 15-441, Arizona Revised Statutes, which reads as follows:

"A. The board of trustees shall prescribe and enforce rules for the government of the schools, not inconsistent with law or rules prescribed by the state board of education."

(d) The statute defining the general powers and duties of the members of the board of trustees of each school under the jurisdiction of the State Board of Education is Section 15-442, Arizona Revised Statutes, which reads as follows:

"A. The board of trustees shall:

"1. Maintain the schools established by them for a period of not less than eight months in each school year, and if the funds of the district are sufficient,

maintain the schools for a longer period, and as far as practicable with equal rights and privileges.

"2. Enforce the courses of study and the use of text books prescribed and adopted by the state board.

"3. Visit every school in the district and examine carefully into its management, condition and needs.

"4. Provide transportation for any child or children when deemed for the best interest of the district, whether within or without the district, county or state.

"5. Exclude from schools all books, publications or papers of a sectarian, partisan, or denominational character.

"B. The board may:

"1. Expel pupils for misconduct.

"2. Exclude from the primary grades children under six years of age.

"3. Make such segregation of groups of pupils as it deems advisable.

"4. Maintain such special schools during vacation as deemed necessary for the benefit of the pupils of the district."

(c) The statute prescribing for the display of the flag and patriotic exercises in the schools in respect thereto is set forth in Section 15-1031, Arizona Revised Statutes which reads as follows:

"A. The school authorities of a public school shall purchase a United States flag, flagstaff and appurtenances and display the flag upon or near the public school building during school hours and at such other times as they direct.

"B. The state superintendent of public instruction shall prepare for use in the public schools a program providing for a salute to the flag and other pa-

triotic exercises, as meet the requirements of the different grades. He shall also make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day, Flag day and other legal holidays of like character."

11. That pursuant to the authority given to it the said state board prescribed a course of study in music for all of the children in rural elementary schools such as the Pinetop Elementary School. That in order to carry out and effectuate such music program the said state board issued music and songbooks to be used by all of the students enrolled in the elementary schools at stated intervals when the principals or teachers, acting separately or together, call for school music assembly. That said music and songbooks contain the National Anthem and, as a part of the course of study prescribed by the said state board of education, the students of each school are required to stand for the singing of the National Anthem or stand for the playing of the National Anthem on musical instruments when it was not sung. That said course of music and singing was adopted by the defendant Pinetop Elementary School Board pursuant to the program promulgated by the state board including the standing for the National Anthem. That said course of study for music and singing prescribed by the state board through the issuance of said songbooks and other instructions constituted a policy or an order of the state board of education that was tantamount to a regulation of said state board, even though there is no written board regulation. The defendant trustees of the Pinetop board were obliged to carry out and enforce said order or policy of the state board to stand for the National Anthem even though not having a written regulation requiring students in the Pinetop school to stand for the National Anthem. Said statewide policy was in effect for several years before the incidents described in this complaint.

12. That on and prior to September 29, 1961, the defendant school board had in full force and effect a musical program pursuant to the orders of the state board of education which required the students of the Pinetop Elementary School to attend the general assembly of the school students in the gymnasium in said school. That pursuant to the policies and conduct of the school ordered or prescribed by the state board of education as a part of said music program the music for the National Anthem was played on a record, following which the pianist for the school played on the piano the music for the National Anthem, whereupon the students were commanded to stand prior to the singing of the National Anthem by the assembled school group. Pursuant to the program and practice under the direction of the state board of education the principal of the school ordered such a music assembly in the school gymnasium on or about September 29, 1961. That Daniel Mark Sheldon, age 12, son of the plaintiff Sheldon, Merle William Wingo, age 14, and Jere Bruce Wingo, age 13, sons of the plaintiffs Wingo, remained sitting and refused to stand preparatory for the singing of the National Anthem when ordered to do so by the principal of the said school. Daniel Mark Sheldon, Merle William Wingo and Jere Bruce Wingo were jointly requested by the principal of the school to stand for the National Anthem or else leave the school and not return at any time unless and until they would sing the National Anthem. All three refused to stand, as ordered, and were ordered to leave school. This order of the principal in effect constituted expulsion of the said children from the Pinetop Elementary School. The order was specifically authorized by all three of the defendant trustees of the Pinetop Elementary School Board prior to September 29, 1961, notwithstanding the knowledge of said trustees of the conscientious religious objections of the said children to standing for the singing of the National Anthem or participating therein. That after said three children were ordered from the auditorium and expelled from the school

plaintiff George W. Sheldon, acting for the other named plaintiffs, remonstrated with and pleaded with the principal of the school to excuse the children from standing for the National Anthem and allow them to return to school and receive their education. This request was denied and the said children were again ordered to stay home and away from school until such time as they would stand for the playing or singing of the National Anthem in said Pinetop Elementary School. That said action of the defendant trustees was done by the said trustees as agents, servants and employees of the state board of education in carrying out its power to exercise "supervision over" the public school system and "enforce a course of study in the common school" and to prescribe the subjects and textbooks for such schools. That after the said expulsion of said children the defendant, W. W. Dick, state superintendent of public instruction and chief executive officer for the state board of education, the defendant herein, made a special visit to the Pinetop Elementary School and discussed the matter with the principal and the trustees and in all things ratified and approved the order of the principal for the plaintiff's children to stand for the singing of the National Anthem and also the order of expulsion of said three children from school because of their refusal to stand for the singing of the National Anthem. That the orders of the state board of education prescribing the songbook and prescribing the singing of the National Anthem and the standing of the students for it and the action of the school trustees as agents, servants and employees of the state board of education together with the acts and conduct of the defendant state superintendent of public instruction constituted state action and a state construction of Sections 15-102, 15-305, 15-441, 15-442 and 15-1031 of the Revised Statutes of Arizona, so as to make said statutes unconstitutional, as construed and applied to the said plaintiffs and their children, as hereinafter specifically alleged. The said children refused

to stand for the singing of the National Anthem solely because of their said above-described conscientious objections thereto. The said children were expelled from the said school solely by virtue of and pursuant to the above-described statutes and policies of the defendants thereunder. That the said children were not guilty of any other misconduct of any kind or character and were excellent students in every respect, save and except their refusal to stand for the National Anthem ceremony at said school.

13. That since the said expulsions the parents of said children, plaintiffs herein, have attempted by pleas and requests to the principal and defendants-trustees of said Pinetop Elementary School to reinstate said children and to have them excused from participation in the National Anthem ceremony and standing for it. Such requests have been denied. Plaintiffs have attempted to educate their children themselves at home but after several months of diligent effort have found that, because of the requirements upon the parents to take care of their homes and to provide for the families and financial inability the instruction given at home has been wholly inadequate and did not come up to the requirements of the education law of the state. That said plaintiffs after months of effort discovered that they were unable because of circumstances beyond their control, especially lack of money, to send their children to any private boarding school or to provide private instruction, both as required by law to meet the standard of education prescribed by the State of Arizona. That the delay in bringing this action has been due solely to the efforts of plaintiffs aforesaid to provide suitable education so as to avoid the necessity of suing the defendants. But since such efforts to avoid this action have failed it is now imperative to sue for redress of the wrongs done by the defendants.

14. Since September, 1961, in various parts of said state a large number of children of Jehovah's Witnesses, on refusing to stand for said ceremony, have been threat-

ened with expulsion from school and denial of the right to attend the public schools until they agree to violate their consciences by standing for said ceremony. That large numbers of said children in many schools of the state will be excluded from attending any of the public schools of said state during future terms of school. That the various trustees, principals and teachers of said schools that have threatened to exclude said children have acted as agents of and under direction of the defendants state board and state superintendent. That the sole reason for said threatened expulsions and exclusion of said children and subsequent inability to attend any of said public schools will be their refusal to stand for such ceremony and not because they have violated any other rule of the respective schools they attend. In other respects said children are well behaved and obey all rules except that pertaining to the National Anthem ceremony.

15. That under the laws of the State of Arizona all of the children of Jehovah's Witnesses of compulsory education age are required by law to attend school from the opening of the school term in the fall until the summer closing thereof. That such children are subject to a charge of truancy, dependency and delinquency under the laws of Arizona if they do not attend the public schools during such terms of school until they have passed the compulsory education age. That under the laws of Arizona the parents of said children of Jehovah's Witnesses are subject to prosecution for failure to have their said children in public schools and also to loss of custody of their children, notwithstanding the conscientious objections of such parents and their said children to participation by the children in the National Anthem ceremony and standing therefor.

16. That numerous parents of said children are liable to be charged, prosecuted and convicted for the alleged offense of contributing to delinquency of said minors who

will be denied schooling by the defendants, their agents, servants and employees, as aforesaid. The basis for these prosecutions will be the fact that said parents have and will have taught their children the Word and commandments of Almighty God against standing for the National Anthem and the fact that said children elected to refuse to stand for and participate in said ceremony.

17. That each of the persons for whose benefit this action is brought, like each plaintiff, is financially unable to have his said child or children attend any private school where such equivalent instruction is obtainable. That if said children receive an education at all the only place they can receive it is in the public school of said state.

18. The defendants, their agents, servants and employees threaten to continue to require said children to stand for the said National Anthem as aforesaid, which will cause said children to be permanently excluded from the public schools of said state as above alleged.

19. That the 1962-1963 school term will begin in early September, 1962, and that will be followed by subsequent terms in ensuing years, and many children of Jehovah's Witnesses will be required to enroll and will enroll in the public schools of this state. They will be so required throughout the school age of all children of Jehovah's Witnesses in the State of Arizona for all time to come in the future. They will refuse to participate in said ceremony or to stand for it for all time to come in the future. The children will be expelled by reason of their continued refusal to stand for the National Anthem under the above policy, order or regulations of defendants in every school throughout said state. Thus said children and their parents will be denied their civil and property rights contrary to law. That said parents have been, are now and will continue in the future to be financially unable to provide said childern instruction in private schools equivalent to that obtainable in the public schools.

20. That adult persons for whom this action is brought will be threatened with immediate continued prosecution under penal statutes prohibiting the contributing to alleged truancy and alleged delinquency of their minor children of compulsory school age because said children are by defendants denied the right to attend public schools.

21. That great numbers of children of compulsory school age for whom this action is brought have been and are threatened with action against them to expel them from school. This will result in their being without schooling, causing them to be dealt with under the dependency laws of said state.

22. That for each said adult to send his child or children to a private school maintaining standards approvable under said state's educational laws would entail an annual expense of huge unbearable sums for each child, which expense would continue until each of said children reaches an age which exempts him from compulsory attendance at an approved private school, requiring each of said adult persons to bear a total expense exceeding $10,000.00, exclusive of interest and costs, which expense each of said adults would be required to pay or incur in order to comply with the compulsory education laws of said state.

23. By reason of the aforesaid conduct on the part of said officials of Arizona, the defendants, their agents, servants and employees, the plaintiffs and other of Jehovah's Witnesses have been interfered with and the exercise of their constitutional, civil and property rights has been frustrated by the defendants. That the defendants' acts and threatened acts above described have produced and will continue to produce great, immediate and irreparable injury by loss of public education of plaintiffs' children and all other of Jehovah's Witnesses similarly situated in said state.

24. Plaintiffs and all others for whom this action is brought, including the three minor boys of plaintiffs, are without adequate remedy at law, and the conduct and the trespasses of defendants above described are continuous. Only a suit for injunctive relief will stop such unlawful conduct of defendants and it is only by injunctive process of this Court that plaintiffs can enjoy, exercise and practice their civil rights of free press, free speech, freedom of assembly and freedom to worship Almighty God publicly. It is necessary that such injunctive relief hereinafter requested be granted in order properly and adequately to protect plaintiffs, Jehovah's Witnesses, from the foregoing wrongs, injuries and irreparable damage of loss of right to public education committed against them by defendants, and in order properly to safeguard constitutional rights, civil and property, of all persons for whom this action is brought. The granting of the requested injunction will prevent a multiplicity of suits and actions at law, in which said aggrieved persons for whom this action is brought cannot adequately protect their said rights.

25. That Sections 15-102, 15-305, 15-441, 15-442 and 15-1031, Arizona Revised Statutes, as well as the orders, policies, programs or regulations thereunder promulgated by said State Board of Education and said Superintendent of Public Instruction requiring standing for the National Anthem ceremony are unconstitutional, null and void, as construed and applied by defendants-officials to plaintiffs and all other of Jehovah's Witnesses for whom this action is brought, because they conflict with the First and Fourteenth Amendments to the United States Constitution in the following particulars:

(a) They unreasonably abridge the rights of said parents and children freely to worship Almighty God according to his written law and the dictates of conscience;

(b) They unlawfully force and coerce said children to engage in a religious rite or ceremony contrary to their

conscientious objection thereto as a condition precedent to enjoyment of fundamental personal rights;

(c) They unreasonably abridge the rights of said parents and children to have the children attend and receive education in free public schools of said state on equal terms with other inhabitants of said state;

(d) They unreasonably restrict said parents in their liberty of choice and direction in the upbringing of their children;

(e) They unreasonably restrict the liberty of the parents freely to impart to their children a knowledge of the commandments of Almighty God as recorded in the Bible, which requires said parents to "bring them up in the nurture and admonition of the lord;" and

(f) They unlawfully burden the liberty of said parents and children to maintain a home and enjoy the normal relationship thereof.

26. Each of the above-enumerated infringements violates, as above alleged, the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

27. That the application and enforcement of said state statutes and orders, policies, programs or regulations or any of them against pupils who conscientiously object to standing for such ceremony, do not instill love of liberty and democratic principles and devotion to country in the minds of the children and youths thus forced to participate. Forced-standing for the ceremony does not prove loyalty to the nation because any disloyal person can stand so as to hide his disloyalty. The natural tendency of compelling a conscientious objector to stand for it is to hinder and obstruct loyalty to country because of attempted coercion and oppression of conscience.

28. That the refusal of children of Jehovah's Witnesses

to stand for the ceremony does not present a clear and present danger against peaceful, lawful, proper and regular operation of the Pinetop Elementary School, its programs, courses of study or student activity or of any other public school in said state, nor does such refusal present a clear and present danger against the peace of the law-abiding teachers and pupils of any such school.

29. That there is nothing in the faith or practices of not standing for the National Anthem based upon the faith of persons for whom this action is brought that can be claimed to be contrary to morals, health, safety or welfare of the public, the state or the nation.

30. That because constitutionality and validity of state statutes of Arizona under the Federal Constitution are drawn in question, and because plaintiffs are asking for a preliminary injunction restraining the enforcement of said statutes, plaintiffs are entitled under 28 U. S. C. §§ 2281 and 2284 to a statutory three-judge court consisting of another United States District Judge and a United States Circuit Judge, or to include two United States Circuit Judges, to hear and to decide this cause, both on application for preliminary injunction, which is here insisted upon, and also on final hearing, as provided by law.

31. That plaintiffs allege that the methods for securing a definite ruling in the state courts cannot be pursued with full protection of the constitutional claims and that there is no clear and adequate remedy in the state courts that will dispose of the constitutional questions as speedily as the remedy employed here. There are no administrative remedies provided for in the law of Arizona to review the decision and action of the defendant board of trustees excluding plaintiffs' children. Plaintiffs have exhausted all administrative remedies that are available in the law of Arizona by appealing to the board of trustees for an order exempting the plaintiffs' children from participation in the National Anthem ceremony. Such board has refused all

requested relief. Any appeal to the State Superintendent of Public Instruction or to the State Board of Education would be useless, futile and in vain because all of said officials are under the mandate of the statutes to enforce them and, since there is no provision in the statutes for an order excusing any person from participation in the National Anthem ceremony for religious scruples, neither the Superintendent of Public Instruction nor the State Board of Education has any authority to excuse the plaintiffs' children from participation in said ceremony and both have informally approved the expulsions herein. The mandate of the statutes is inexorable. Plaintiffs further allege that the Superintendent of Public Instruction and the State Board of Education have expressly approved as the law of Arizona and adopted, pursuant to the statutes, an opinion of the Attorney General of Arizona that all children of Jehovah's Witnesses could be forced by the schools of Arizona to stand for the singing of the National Anthem or else be excluded from school, as provided for by the statutes above quoted. The plaintiffs therefore are without an adequate remedy at law, either administratively or judicially in the forums of the State of Arizona and the only place where the plaintiffs can get full, complete, adequate and prompt relief is in this Court. There are many of Jehovah's Witnesses involved in many school districts in various counties of the state which will require separate suits or a multiplicity of actions to accomplish the determination here sought in one action for the whole state. There is, therefore, no adequate remedy in the state courts.

WHEREFORE your plaintiffs, in order to obtain an interlocutory injunction, offer to make such bond as may be prescribed by the Court, with good and sufficient security to be approved by the Court, and pray as follows:

(A) That a copy of the complaint and the notice of hearing on application for temporary injunction have been

served upon the Governor and the Attorney General of said state;

(B) That the Judge of this Court issue an order, followed by notice to the defendants, calling a statutory three-judge court to hear the plaintiffs' application for an interlocutory injunction as prayed for herein; and plaintiffs further pray that, after making the order calling a three-judge court, this Court, upon a consideration of this complaint, further order the application for a preliminary or interlocutory injunction above prayed for and contained herein be set down at a fixed time and place for hearing before said three-judge statutory court; and that notice issue unto each of the defendants, commanding them to appear at such time and place and show cause, if any they have, why the preliminary or temporary restraining order, restraining the defendants, their officers, agents, servants and employees from enforcing said statutes and regulations as to plaintiffs and other of Jehovah's Witnesses, should not be granted as prayed for by plaintiffs; and further to show cause why this Court should not render and enter an order granting a preliminary or interlocutory injunction restraining each of the above named defendants, their officers, agents, servants and employees from enforcing said statutes and regulations hereinabove described as to plaintiffs and all other of Jehovah's Witnesses for whom this action is brought, and from excluding from the public schools of said state children of Jehovah's Witnesses on account of their refusal to stand for or participate in the National Anthem ceremony;

(C) Plaintiffs further pray that upon a final hearing this Court enter an order declaring said above-described statutes invalid and void under the First and Fourteenth Amendments to the Federal Constitution to which they are contrary as construed and applied to plaintiffs' activities and conduct because they have been so construed and applied and will be so construed and applied as above specified by defendants and also to deprive plaintiffs and other of

Jehovah's Witnesses of their right to exercise and enjoy freedom to worship Almighty God in conformity with his written commandments contained in the Bible and in accordance with the dictates of conscience, and their civil rights of freedom of speech, of press and of assembly; plaintiffs further pray that said preliminary injunction be made permanent upon a final hearing, restraining the defendants, their officers, agents, servants and employees from enforcing said statutes and regulations as to plaintiffs and other of Jehovah's Witnesses; and

(D) Plaintiffs further pray for such other and further relief as they may show themselves justly entitled to in the premises.

Hayden C. Covington

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Harry J. Valentine

Harry J. Valentine
321 Goodrich Building
Phoenix, Arizona

Attorneys for Plaintiffs

STATE OF NEW YORK, County of Kings, ss.:

HAYDEN C. COVINGTON, being sworn, says:

That he is one of the attorneys for the plaintiffs in the above-entitled cause; that he has read the foregoing First Amended Complaint, which he has signed on behalf of plaintiffs; that the facts therein stated are true of his own knowledge, except as to such statements therein as are made on information and belief, and as to such statements he

believes them to be true; that your affiant is authorized to make this affidavit in behalf of the plaintiffs and the reason for not having one of the plaintiffs make the affidavit is the great distance between the parties and either of their attorneys.

Hayden C. Covington

Hayden C. Covington

Sworn to and subscribed before me this 21st day of June, 1962.

William K. Jackson

William K. Jackson
Notary Public, State of New York
No. 24-1939100
Qualified in Kings County
Commission Expires March 30, 1963

FILED
JUN 25 1962
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona
By Winona Andre
Deputy Clerk

Received copy of First Amended Complaint on this 25th day of June 1962

Robert W. Pickrell
Attorney General
By
Frank Sagarino
Assistant Attorney General

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FIRST TRIAL AMENDMENT TO FIRST AMENDED COMPLAINT

TO SAID HONORABLE COURT:

Now come the above-named plaintiffs at the pretrial conference, pursuant to Rule 16 (2) of the Federal Rules of Civil Procedure, and request the Court to permit them to file the

following amendment to paragraph 10(d) of the First Amended Complaint so as to change the allegation in that paragraph about Section 15-442, Arizona Revised Statutes, "A. 2." on page 7 of the First Amended Complaint to read as follows:

> "2. Enforce the courses of study and select all textbooks used in the schools from the multiple lists determined and authorized by the state board of education pursuant to paragraph 18 of section 15-102 and purchase the same from the publishers under contracts negotiated by the state board as provided in this title. . . ."

The plaintiffs re-adopt all of the other allegations in their First Amended Complaint and re-allege them here as though fully set forth herein.

WHEREFORE the plaintiffs pray as in the First Amended Complaint.

Hayden C. Covington

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Harry J. Valentine

Harry J. Valentine
204 Goodrich Building
Phoenix, Arizona

Attorneys for Plaintiffs

(Endorsed)
FILED
SEP 17 1962
Wm. H. Loveless
Wm, H. Loveless, Clerk
United States District Court
for the District of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

SECOND TRIAL AMENDMENT TO FIRST AMENDED COMPLAINT

TO SAID HONORABLE COURT:

Now come the above-named plaintiffs at the pretrial conference, pursuant to Rule 16 (2) of the Federal Rules of Civil Procedure, and request the Court to permit them to file the following amendment to paragraph 12 of the First Amended Complaint so as to omit the word "sing" on line 13, page 10, in said paragraph, and to substitute in lieu thereof the following: "stand for the playing or singing of."

The plaintiffs re-adopt all of the other allegations in their First Amended Complaint and re-allege them here as though fully set forth herein.

WHEREFORE plaintiffs pray as in the First Amended Complaint.

Hayden C. Covington
Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

(Endorsed)
FILED
SEP 17 1962
Wm. H. Loveless
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona

Harry J. Valentine
Harry J. Valentine
204 Goodrich Building
Phoenix, Arizona

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THIRD TRIAL AMENDMENT TO FIRST AMENDED COMPLAINT

TO SAID HONORABLE COURT:

Now come the above-named plaintiffs at the pretrial conference, pursuant to Rule 16 (2) of the Federal Rules of Civil Procedure, and request the Court to permit them to file the following amendment to paragraph 25(b) of the First Amended Complaint so as to add to such pleading the additional allegation as follows: "and they thereby constitute the 'establishment of religion' and thereby deprive plaintiffs of their constitutional rights."

The plaintiffs re-adopt all of the other allegations in their First Amended Complaint and re-allege them here as though fully set forth herein.

WHEREFORE plaintiffs pray as in the First Amended Complaint.

Hayden C. Covington
Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Harry J. Valentine
Harry J. Valentine
204 Goodrich Building
Phoenix, Arizona
Attorneys for Plaintiffs

(Endorsed)
FILED
SEP 17 1962
Wm. H. Loveless
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FOURTH TRIAL AMENDMENT TO FIRST AMENDED COMPLAINT

TO SAID HONORABLE COURT:

Now come the plaintiffs at the pretrial conference, pursuant to Rule 16 (2) of the Federal Rules of Civil Procedure, and request the Court to permit them to file the following amendment to paragraph 11 of the First Amended Complaint so as to add the allegations which follow in this trial amendment to such paragraph and beginning at the end of the last sentence of such paragraph, reading as follows:

"That the defendant W. W. Dick, acting for the Board of Education of Arizona as its chief executive officer under Section 15-102 (14) (15) and (16), and also acting for himself as a state official carrying out state policy prescribed by the legislature of Arizona in Section 15-1031 (B) did 'prepare for use in the public schools a program providing for . . . other patriotic exercises' by causing to be distributed to all of the county superintendents of education of the state of Arizona the opinion of the Attorney General of Arizona 1961 Opinion No. 61-21, a County Attorney Concurring opinion, which provides that the school officials of Arizona may compel children of Jehovah's witnesses, having conscientious scruples against standing for the playing or singing of the National Anthem, to stand, and which opinion further provides that the orders of school officials compelling such children to stand contrary to such conscientious scruples does not constitute a violation of their rights of freedom to worship. That following the said statewide distribution of such opinion of the Attorney

General by the defendant Dick to all of the county superintendents of education in Arizona the contents of said opinion of the Attorney General or copies thereof were distributed by said county superintendents of education to all of the elementary schools of said state, in carrying out the 'other patriotic exercises' prepared by and distributed by the defendants, Board of Education of Arizona and superintendent of Public Instruction. That the issuance of said songbooks containing the National Anthem and circulation of them as a part of the course in music which requires the singing of the anthem or playing it in school, in addition to being a statewide act by the State Board of Education acting through its chief executive officer the defendant Dick also constituted an order by him as the state official described in Section 15-1031 (B) of the Arizona Statutes prescribing the anthem as one of the 'other patriotic exercises' mentioned in said statute and also the statewide circulation of said opinion of the Attorney General constituted a second act by the said defendant Dick that established the playing and singing of the National Anthem as a part of the courses of study of the schools of Arizona and established it as one of the 'other patriotic exercises' described in Section 15-1031 (B) of the Arizona Statutes. The plaintiffs further alleged that all of the above described acts and conduct on the part of the defendants, acting together and in concert with all the other school officials of Arizona, constituted acts and action of state officials of Arizona which make all of the statutes described in paragraph 10 above unconstitutional, as constructed and applied, for the reasons and in the manner hereinafter alleged in paragraphs 25 and 26 of this complaint."

The plaintiffs re-adopt all of the other allegations in their First Amended Complaint and re-allege them here as though fully set forth herein.

WHEREFORE the plaintiffs pray as in the First Amended Complaint.

Hayden C. Covington

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Harry J. Valentine

Harry J. Valentine
204 Goodrich Building
Phoenix, Arizona

Attorneys for Plaintiffs

(Endorsed)
FILED
SEP 17 1962
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona
By Vera M. Whiteside
Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

TO SAID HONORABLE COURT:

The defendants move the Court as follows:

1

To dismiss the action for lack of jurisdiction over the persons and subject matter.

II

To dismiss the action because of failure to state a claim.

III

The defendants move for summary judgment in their favor pursuant to Rule 56, Federal Rules of Civil Procedure on the grounds that there is no triable issue of fact and that defendants are entitled to judgment as a matter of law in their favor as shown by the pleadings and depositions filed in this action and the affidavits attached to this motion.

Robert W. Pickrell
The Attorney General

Fred O. Wilson
Navajo County Attorney

By Frank Sagarino
Frank Sagarino
Assistant Attorney General
Attorneys for Defendants

NOTICE OF MOTION

DEFENDANTS request that because a three-judge court has been convened that the above mentioned motion be heard by this Court at the time of the pretrial conference.

Robert W. Pickrell
The Attorney General

Fred O. Wilson
Navajo County Attorney

By Frank Sagarino
Frank Sagarino
Assistant Attorney General
Attorneys for Defendants

MEMORANDUM

Defendants' motion to dismiss or in the alternative for summary judgment is substantiated by the pleadings and depositions heretofore filed in this action, and the affidavits of Wesley Bolin and Wes A. Townsend, attached to this motion.

Plaintiffs' contention for injunctive relief is predicated upon the allegations in Paragraph 12 of their First Amended Complaint, that is, that Daniel Mark Sheldon, age 12, Merle William Wingo, age 14, and Jere Bruce Wingo, age 13, sons of plaintiffs Sheldon and Wingo were required to stand while the rest of the class at the Pinetop Elementary School sang the Star Spangled Banner; that said children refused to stand and were excused from school, and the Boards of Trustees and the principal have refused to readmit the said students. Injunctive relief from a three-judge statutory court is bottomed upon the enjoining of the enforcement of a state statute or state administrative order. None of the statutes that plaintiffs refer to in Paragraph 10 of their First Amended Complaint require students to stand while the Star Spangled Banner is sung in a classroom. The Arizona Revised Statutes require a statutory procedure to be followed in order that a state agency as the State Board of Education can validly promulgate a rule and/or regulation. This Court can take judicial notice of the statutory procedure as contained in A.R.S. §41-1001 to §41-1006, inclusive. To be a valid rule or regulation requires it to be certified and filed in the office of the Secretary of State (A.R.S. §15-1004). The affidavit of Wesley Bolin attached to this motion discloses the non-existence of any rule or regulation requiring standing of students while the National Anthem is sung.

Plaintiffs' claim in Paragraph 13 of their First Amended Complaint that the State Board of Education and Superintendent of Public Instruction have expressly approved as the Law of Arizona and Opinion of the Attorney General that all children of Jehovah's Witnesses could be

forced by the schools of Arizona to stand in the singing of the National Anthem or else be excluded. A copy of that Opinion, attached hereto, is an opinion of the Coconino County Attorney who is, by statutory law, attorney for the boards of trustees of school districts within his county (A.R.S.§11-532), and concurred in by the Attorney General as provided for by A.R.S.§15-122(b). The Opinion merely states that a local school board could require children of Jehovah's Witnesses to stand, but not sing, while other students were standing and singing the National Anthem in order to maintain discipline in the classroom. The Opinion is in no wise obligatory, but only advisory, and that the purpose of Attorney General's school opinion is to relieve local school boards of personal liability, if they act in reliance upon Attorney General's Opinions as provided for by A.R.S.§15-436 (b).

The affidavit of Wes A. Townsend, attached hereto, relating to the courses of study negate any requirements that children are required to stand for the singing of the National Anthem or be expelled for failure to stand as required by a teacher.

The depositions of George W. Sheldon and Merle William Wingo admit:

1. That they will stand while others recite and pledge allegiance to the Flag.

2. That they have no objection to hearing others sing the Star Spangled Banner in their presence.

3. That they have no objection to pupils being required to stand and recite school lessons.

Defendants contend that the requirement of standing was incidental to the maintenance of order and discipline in the classroom and/or is not such an invasion of plaintiffs' religious belief to constitute a substantial federal constitutional question.

THEREFORE, defendants contend that plaintiffs have failed to state a claim for relief.

Robert W. Pickrell
The Attorney General

Fred O. Wilson
Navajo County Attorney

By Frank Sagarino
Frank Sagarino
Assistant Attorney General
Attorneys for Defendants

Copy of the foregoing mailed this 5th day of July, 1962 to:

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Harry J. Valentine
321 Goodrich Building
Phoenix, Arizona

Attorneys for Plaintiffs

AFFADAVIT

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

WES A. TOWNSEND being first duly sworn, deposes and says:

THAT he is director of elementary education for the Arizona State Department of Public Instruction, and that in such capacity he is familiar with the courses of study for instruction as adopted by the Arizona State Board of Education for the public elementary schools in the State of Arizona.

THAT the courses are suggestive in respect to the time allocated for each subject area; that the courses of study do not require any pupil to stand for the singing of the Star Spangled Banner, nor do they require any pupil to be expelled for failure to stand if the Star Spangled Banner is being sung in any public elementary school in Arizona; that the courses of study do recommend that pupils sing and know words for various songs. Among the songs is included the Star Spangled Banner. These suggestions are not compulsory and each individual school district works out its own program of instruction for music. This, like other areas of teaching, comes under the jurisdiction of the local school boards.

THAT the affiant states that the above matters contained in this affidavit are within his personal knowledge and that he is willing to testify to matters stated therein.

Wes A. Townsend

SUBSCRIBED and SWORN to before me this 5 day of July, 1962.

Ross Gusterson
Notary Public

My Commission Expires:
My Commission Expires March 22, 1966

STATE OF ARIZONA

OFFICE OF THE SECRETARY

UNITED STATES OF AMERICA)
) SS.
STATE OF ARIZONA)

I, WESLEY BOLIN, Secretary of State, do hereby certify that I am the custodian of all certified rules and regulations filed in this office; that I made a search of the rules and regulations of the Arizona State Board of Education and

as a result of said search, I failed to find any rule or regulation requiring any student to stand while a classroom is singing the National Anthem.

In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Arizona. Done at Phoenix, the capital, this 5th day of July A. D. 1962.

Wesley Bolin
Secretary of State

[Seal]

Laurance T. Wren
County Attorney

Robert W. Warden
William J. Meyers
Deputy County Attorneys

Office of
County Attorney
Coconino County
P. O. Box 1161
Flagstaff, Arizona

August 28, 1961

Mr. Arthur Bowie
Superintendent, Williams Public Schools
Williams, Arizona

Dear Mr. Bowie:

The following is the opinion requested by you.

Question: May students in public schools refuse to stand while the National Anthem is sung on the ground of conscientious religious objection?

Answer: No.

Reasoning: The question here involves the belief of members of Jehovah's Witnesses that the act of standing during the singing of the National Anthem would violate

the command of God. It is contended that requiring children of this sect to stand during such exercises, although they are not required to sing, would violate their religious freedom as protected by the First Amendment of the Federal Constitution.

The Arizona case of State of Arizona vs. Davis, 58 Ariz. 444, 120 P2d 808 (1942) deals with the closely related problem of whether children of this sect could be required to give the Pledge of Allegiance. The Court in that case stated, "The vast majority of our people believe, and we think correctly so, that the salute to the flag, which typifies our country and the principles upon which it is founded, is a wise, reasonable and patriotic exercise and that it is in the interest of the welfare of the children of the country that they participate in this single exercise, and that a failure to follow the almost universal custom in this respect does tend to ignore the morals and future welfare of the children in ways too numerous to mention. Any attempt to direct or compel a child to refuse to follow the national custom in this respect in our opinion does contribute to the delinquency of the child, and may properly be made a crime by the state without violating the First Amendment."

It would seem clear under this decision that the schools could also require children to stand during the singing of the National Anthem. However, this case must be read in connection with the case of *"The West Virginia State Board of Education vs. Barnette,* 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, (1943) in which it was stated, concerning compulsory giving Pledge of Allegiance.

"We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the state as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its

substance is the right to differ as to things that touch the heart of the existing order."

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

"We think the action of local authorities in compelling the flag salute and pledge transcends constitutional limitations in their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control."

The real question would then seem to be whether the case just decided would prevent school authorities from requiring all students to rise during the singing of the National Anthem, or whether such a requirement would be a violation of the provisions of the First Amendment.

It is the opinion of this office that such a requirement is not an infringement of the protection offered by the First Amendment. It should be noted that the schools are not attempting to have the dissident children sing or make any pledge of any type. The only requirement imposed is that they stand while others who have no objection to singing the National Anthem as part of the Schools' Educational Program do so. The alternative to this requirement would seem to be that of either sending the children who did not wish to sing from the room, which in itself would seem discriminatory and call undue attention to them, or in the alternative, have them remain seated and silent while the others stand and sing, with the resulting confusion that would surely ensue as to who should stand and who should remain seated, and why. It is not our belief that the religious freedom protected by the First Amendment includes the freedom to disrupt patriotic observances by others. As long as the children in question are not required to render

a pledge of any kind, or to take any part in the exercises other than to stand during the period when the other children sing the National Anthem, we do not believe their religious freedom has been invaded any more than if they are required by their teachers to stand while giving a recitation in class. We believe that students may still be required to stand up and sit down within the limits required for the preservation of order and discipline within the classroom without treading upon their religious freedom.

Respectfully submitted,
Robert W. Warden

RWW:11

September 14, 1961

The foregoing opinion issued by ROBERT W. WARDEN, Coconino County Attorney, is in response to request from ARTHUR BOWIE, Superintendent of Williams Public Schools, Coconino County. The Attorney General's office of the State of Arizona; concurs in this opinion as provided in § 15-122, Subsection A-6 and Subsection B, as amended in A.R.S. It is distributed by the Superintendent of Public Instruction for the information and guidance of persons concerned.

(Endorsed)
FILED
JUL 5 1962
Wm. H. Loveless
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ANSWER OF THE DEFENDANTS IN THIS ACTION

COME NOW the defendants in this action and make their Answer in this cause, ADMITTING, ALLEGING and DENYING as follows:

FIRST DEFENSE

I

Defendants ADMIT the allegations in Paragraphs 2, 4 and 9 of plaintiffs' First Amended Complaint.

II

Defendants DENY the allegations contained in Paragraphs 1, 23, 24, 25, 26, 27, 28, 29 and 30 of plaintiffs' First Amended Complaint.

III

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 5, 6, 7, 8, 13, 14, 16, 17, 18, 20, 21 and 22 and, therefore, DENY each and every allegation as contained in those paragraphs of plaintiffs' First Amended Complaint.

IV

Answering Paragraph 3 of plaintiffs' First Amended Complaint defendants ADMIT that each individual defendant is a resident citizen of the United States of America and of the State of Arizona, but DENY that "at all times herein complained of, acted in his official capacity." Defendants ADMIT the allegations contained in the second, fourth, fifth, sixth, seventh and eighth sentence of Para-

graph 3 and DENY each and every other allegation in Paragraph 3.

V

Answering Paragraph 10, defendants ADMIT the existence of the statutes alleged but DENY that the statutes are involved in this action.

VI

Answering Paragraph 11, defendants ADMIT that the State Board of Education prescribed a course of study in music for all of the children in rural elementary districts; but allege such course of study is suggestive not mandatory for local school districts to follow; ADMIT the music and song books contained the National Anthem, but DENY each and every other allegation contained in Paragraph 11.

VII

Answering Paragraph 12, defendants ADMIT that the music was played on the piano; that the students were requested to stand in the classroom prior to the singing of the National Anthem; that the music class was ordered by the principal to stand; that Daniel Mark Sheldon, Merle William Wingo and Jere Bruce Wingo remained seated and refused to stand when requested by the principal and that they were requested to go home and that such order was authorized by the Pinetop Elementary Board of Trustees; and ADMIT that the said children were not guilty of any other misconduct except their refusal to stand. Defendants DENY each and every other allegation contained in Paragraph 12.

VIII

Answering Paragraph 15, defendants ADMIT the allegations contained in the first sentence of Paragraph 15. Defendants ALLEGE that they are without sufficient knowledge or information sufficient to form a belief as to the truth

of all other allegations in Paragraph 15 and, therefore, they DENY each and every other allegation in Paragraph 15.

IX

Defendants DENY the allegations contained in the first and fifth sentences of Paragraph 19 of plaintiffs' First Amended Complaint; and defendants ALLEGE that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 19 and, therefore, they DENY each and every other allegation contained in Paragraph 19.

X

Answering Paragraph 31, defendants ADMIT that there are no administrative remedies to review the decision and action of the defendants, School Board of Trustees, excusing the three children from school; and DENY each and every other allegation contained in Paragraph 31.

SECOND DEFENSE

1

Defendants ALLEGE that the National Anthem is not a religious ceremony within the meaning of the Establishment Clause of the First Amendment of the United States Constitution and, therefore, insofar as the Fourteenth Amendment, it is not within the intendment of that clause of the United States Constitution; that even if the singing of the National Anthem is deemed a religious ceremony within the meaning of the Establishment Clause of the First Amendment of the United States Constitution, the requirement of standing alone does not constitute participating in a religious ceremony within the meaning of the First or Fourteenth Amendments of the United States Constitution; that the National Anthem was sung incidental to instruction in a music class; and that the act or

acts which occurred in such a music class were instructional and nonreligious in nature.

II

Defendants further ALLEGE that the requirement, is alleged in plaintiffs' First Amended Complaint, that plaintiffs' children should stand during singing lessons, while other children were singing the National Anthem, is a reasonable requirement, essential to the maintenance of discipline in the classroom, as any other requirement involving group participation.

THIRD DEFENSE

Defendants ALLEGE that plaintiffs have failed to state a claim for relief.

WHEREFORE, these defendants pray as follows:

1. For an Order denying the plaintiffs any and all relief prayed for.

2. Dismissing this action as being brought before a tribunal without jurisdiction to entertain the same; and

3. Dismissing this action without any relief to these plaintiffs of any kind; and

4. For such other relief as the court may deem proper in the premises.

Robert W. Pickrell
The Attorney General

Fred O. Wilson
Navajo County Attorney

By Frank Sagarino
Frank Sagarino
Assistant Attorney General
Attorneys for Defendants

STATE OF ARIZONA)
)ss
COUNTY OF MARICOPA)

FRANK SAGARINO, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys for the defendants in the above-entitled cause; that he has read the foregoing Answer, which he has signed on behalf of the defendants; that the facts therein stated are true of his own knowledge, except as to such statements therein as are made on information and belief, and as to such statements he believes them to be true.

Frank Sagarino

SUBSCRIBED and SWORN to before me this 16 day of August, 1962.

Ross Gusterson
Notary Public

My Commission Expires:

My Commission Expires March 22, 1966

Copy of the foregoing
mailed this 16th day of
August, 1962 to:
Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York
Harry J. Valentine
321 Goodrich Building
Phoenix, Arizona
Attorneys for Plaintiffs

(Endorsed)
FILED
AUG 16 1962
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona
By Winona Andre
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

MEMORANDUM

In the above case, I have some doubts as to the propriety of convening a three-judge court.

As the case develops, I think I could resolve those doubts, but I shall not be on the court to contribute to that resolution.

In the present posture of the case, I conceive it my duty to empanel a three-judge statutory district court. This I have done. In my view, at the proper time, the court so constituted is at liberty to consider de novo the question of whether it properly has a three-judge case.

Richard H. Chambers
Chief Judge
Ninth Judicial Circuit

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO §2284, TITLE 28, UNITED STATES CODE

WHEREAS, in my judgment the public interest so requires I, pursuant to the provisions of §2284, Title 28, U.S.C., do hereby designate and appoint the

Honorable CHARLES M. MERRILL

United States Circuit Judge for the Ninth Circuit, and the

Honorable DAVE W. LING

and the

Honorable ARTHUR M. DAVIS

United States District Judges for the District of Arizona, to hold the District Court for the District of Arizona at such time and place to be agreed upon by said judges, and to hear and determine the following cause:

GEORGE W. SHELDON, et al., Plaintiffs, vs. PAUL FANNIN, et al., Defendants, Civil Action No. 749, and all motions and proceedings therein.

Dated: April 12, 1962.

Richard H. Chambers
Chief Judge, Ninth Circuit

Copies to:

Judges: Merrill
Ling
Davis
Clerks: CA, 9th Cir.
DAriz.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TRANSCRIPT OF PROCEEDINGS

Pretrial conference, held at Phoenix, Arizona, commencing Monday, September 17, 1962, at 2:00 o'clock p.m.

Before: HON. CHARLES M. MERRILL, U. S. Circuit Judge,
HON. DAVE W. LING, U. S. District Judge, and
HON. ARTHUR M. DAVIS, U. S. District Judge,
Sitting en banc.

[Tr. 16]

JUDGE MERRILL: As I understand the point of standing, this is not expressly required by any state statute or by any ruling of the State School Board; it is required by the local school district under the authority bestowed upon it by the state statutes to which you refer. Am I correct?

[Tr. 17]

MR. COVINGTON: That is correct, your Honor. But even so, that still constitutes state action by the local board in requiring that act of standing that violates the rights of the plaintiffs, and so they are acting under a statute that is statewide in effect.

• • • • •

[Tr. 19]

And they are arguing here that because they don't have anything in black and white for this standing business, that the courts don't have jurisdiction. If that were the situation, as Chief Justice Hughes points out here — this whole opinion is applicable in this matter — it would give

[Tr. 20]

the state the power and authority to play "footsie" with the Federal Courts and evade and elude them by technical arguments that there is nothing in writing commanding this situation.

JUDGE MERRILL: We are not disturbed by the fact that there was no written requirement of standing, as I understand the problem that is preplexing the court. It is simply whether, instead of a governor taking action on behalf of the state, purportedly, it is the circumstances that we have a school district taking action on behalf of a school district.

MR. COVINGTON: But it is also in behalf of the state, because the only authority that they act under is the state statute that clothes them with authority.

JUDGE MERRILL: I appreciate that, but we do not have a situation where this action would result in uniform state policy or action throughout the state. Each independent school board may, as I understand the situation, exercise its own judgment; there may be some school boards that

will not require standing, there may be some that would under these statutes.

MR. COVINGTON: That does not show up under the complaint, may it please the Court. And you are to decide this matter on the complaint.

JUDGE MERRILL: I think the conclusions which you state there are one thing, Mr. Covington.

[Tr. 21]

MR. COVINGTON: I am just merely saying that the Court has laid down the rules; the Supreme Court has said —

JUDGE MERRILL: Have you alleged in the complaint that this is binding, this action will result in binding action on all of the school children throughout all of the state? I don't think you have, Mr. Covington.

MR. COVINGTON: I have not alleged that. I have merely said that they have deprived the plaintiffs of these rights under the statutes that are statewide in effect.

JUDGE MERRILL: Yes, that is right.

MR. COVINGTON: And I don't think we are required to go any farther than that.

JUDGE MERRILL: That is the problem, that is what we are raising here, Mr. Covington.

MR. COVINGTON: I realize that, and I merely say that I will challenge the Court — I am sure that you can't find any decision that goes to the effect that you must show that a local school board has laid down statewide policy. The only question is, are they acting under a statute —

JUDGE MERRILL: I think we understand your position.

MR. COVINGTON: — that is statewide in effect, may it please the Court.

JUDGE MERRILL: I am satisfied that we understand your position on that, Mr. Covington.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Transcript of proceedings, held at Phoenix, Arizona

Tuesday, September 18, 1962

Before: HON. CHARLES M. MERRILL
HON. DAVE W. LING
HON. ARTHUR M. DAVIS

* * * * *

10:53 a. m.

PROCEEDINGS

JUDGE MERRILL: This court is now prepared to rule upon the matter which it raised yesterday afternoon in pretrial session had in this courtroom, with reference simply to the question of whether this proceeding should be before a three-judge court or should proceed before a single judge to whom it was assigned.

After hearing the oral arguments of counsel yesterday, the court has reached a decision.

This morning counsel for the plaintiffs have presented certain proposed amendments of the first amended complaint and have moved for leave to make these amendments, and this court as now constituted has reached a decision as to what its position should be with reference to these matters. A written order has been prepared, which reads as follows:

* * * * *

[Tr. 2]

The plaintiffs have this day tendered four proposed amendments to the first amended complaint. Their motion to amend in these respects is opposed by the defendants. Without ruling on these motions, this court has accepted them as offers of proof. We find nothing in them to change our views as were expressed.

This court as now constituted may then proceed no further. Accordingly, upon this court's own motion, it is ordered that this case proceed henceforth before the single judge to whom this case was originally assigned, as if this three-judge court had never been convened.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ORDER

As we understand the position of plaintiffs (through examination of the entire record before us, their briefs and oral argument,) it is that members of a local school board, acting under authority bestowed by state statutes, statewide in their application to school boards, have violated constitutional rights of these plaintiffs. Such violation consisted of requiring these plaintiffs, as students, contrary to their religious beliefs and on penalty of expulsion, to stand while the national anthem was sung or played in school. This requirement was not imposed by statute or by administrative action of any state agency or officer other than the local school board itself, and had no application to any other school district.

As we read the decisions of the Supreme Court of the United States this does not present a case for a three-judge court.

Ex parte Bransford, (1940), 310 U. S. 354
Wilentz v. Sovereign Camp (1939), 306 U. S. 573
Ex parte Public National Bank of New York (1928), 278 U. S. 101
Ex parte Collins (1928), 277 U. S. 565
See: *City of Cleveland v. U. S.* (1945), 323 U.S. 329

Plaintiffs have this day tendered four proposed amendments to the first amended complaint. Their motion for leave to amend in these respects is opposed by the defendants. Without ruling on these motions this Court has accepted them as offers of proof. We find nothing in them to change our views as here expressed.

This Court as now constituted may then proceed no further.

Accordingly, upon this Court's own motion, IT IS ORDERED that this case proceed henceforth before the single judge to whom the case was originally assigned, as if this three-judge court had never been convened.

Dated this 18th day of September, 1962.

Charles M. Merrill
United States Circuit Judge

Dave W. Ling
United States District Judge

Arthur M. Davis
United States District Judge

(Endorsed)
FILED
SEP 18 1962
Wm. H. Loveless, Clerk
United States District Court
for the District of Arizona

DATE		PROCEEDINGS
1962		
Feb. 19	1	File Plaintiffs' Complaint
Feb. 19		Issue summons.
Feb. 23	1a.	File Order of Judge Chambers fixing time to file briefs on matter of 3-judge court.
Mar. 1	2	File Plaintiffs' Brief Supporting Request

1962		
		for Order Impaneling a Statutory Three Judge Court.
Mar. 1	3	File Plaintiffs' Supplemental Brief Supporting Request for an Order Impaneling a Statutory Three-Judge Court.
Mar. 6	4	Enter and file Order to Show Cause Why Temporary Restraining Order Should not be granted, returnable Tuesday, March 20, 1962, at 10:00 a.m.
Mar. 6	5	File Affidavit of Plaintiff George W. Sheldon Supporting Application for Temporary Restraining Order Pending Disposition of Application for Interloc. Inj.
Mar. 15	—	Order continuing Order to Show Cause from Mar. 20 to Mar. 27, 1962 at ten a.m.
Mar. 24	6	File Reply Brief to Plaintiffs' Request for Order Impaneling a Statutory Three-Judge Court.
Mar. 27	7	File Defendants' Response to Order to Show Cause.
Mar. 27	8	File Response of Defendants Frank Crosby, Vera Matthews and A. L. Penrod as members of Board of Trustees etc. to Order to Show Cause.
Mar. 27	9	File Affidavit of Head Teacher, Sam B. Jones, Jr. in Support of Defts Response.
Mar. 27	—	Pltfs' Application for Temp. Restraining Order on for hearing pursuant to order to show cause. Hayden Covington and Harry Valentine appear for pltfs. Wm. C. Kennedy and Frank Sagarino, Asst Attys General for State of Ariz., and Fred Wilson, County Atty for Navajo County, appear for defts-respondents. Pltfs' witnesses sworn and testify; defts. reserve any evidence at this time and move to dismiss the petition and to quash the pro-

1962

			posed restrain'g order. It is ordered that the motion of respondents will be granted and a temporary restraining order at this time will not be granted. Counsel agree that question of whether appl. for interloc. injunc. should be heard by a 3-judge or 1-judge court may be submitted to Judge Chambers on the papers and briefs now on file.
Apr.	9	10	File Summons showing service of summons and order to show cause on Frank Crosby, A. L. Penrod (who states true name is Arch L. Penrod), Pinetop Board of Trustees, Vera Matthews, Richard A. Harvill, Waldo M. Dicus, State Board of Education, Governor for the State of Arizona, W. W. Dick as Supt. of Schools, The Attorney General for the State of Arizona and Dr. G. Homer Durham, President of Arizona State University and service of summons on Bessie Kidd Best, Lawrence J. Walkup, Governor of the State of Arizona and Dr. G. Homer Durham, and service of Order to show cause on Bessie Kidd Best and Lawrence J. Walkup and order to show cause unserved as to Charles Burton.
Apr.	14	11	File Order of Judge Chambers Empaneling Three-Judge Court, and Memorandum.
Jun.	21	12	File Deposition of Frank L. Crosby
Jun	21	13	File Deposition of Arch L. Penrod
June	21	14	File Deposition of George W. Sheldon
Jun	21	15	File Deposition of W. W. Dick
Jun	21	16	File Deposition of Merle William Wingo
Jun	21	17	File Deposition of Sam B. Jones, Jr.
June	25	18	File Plaintiffs' First Amended Complaint.

1962			
Jun	29	19	File Plaintiff's Affidavit of service of copies of amended complaint on Fred O. Wilson and on Frank Sagarino, attorney for defts.
Jul	5	20	File Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, notice of hearing at time of pretrial conf., and memorandum.
Aug.	8	—	Minute Entry; It is ordered that this case is set for Pre-trial Conference on Monday, September 17, 1962 at 2:00 o'clock p.m. and for trial on Tuesday, September 18, 1962 at 10:00 o'clock a.m.
Aug.	10	—	Mail notice to counsel.
Aug.	16	21	File ANSWER of the defendants.
Sep.	14	22	File Main Brief of Plaintiffs on Final Hearing.
Sep.	17	23	File Affidavit in Answer to Motion for Summary Judgment, by Plaintiffs.
Sept.	17	24.	File Plaintiffs' Motion for Leave to File First Trial Amendment.
Sept.	17	25.	File Plaintiffs' Motion for Leave to File Second Trial Amendment.
Sept.	17	26.	File Plaintiffs' Motion for Leave to File Third Trial Amendment.
Sept.	17	27.	File Plaintiffs' Motion for Leave to File Fourth Trial Amendment.
Sept.	17	—	This case comes on regularly for pre-trial conference at two o'clock p. m. this date before a three-judge court. Hayden Covington and Harry Valentine appear as counsel for plaintiffs and Frank Sagarino, Robert Murlless, and Fred O. Wilson appear as counsel for defendants. The question of whether this case is a proper case for hearing by a three-judge district court, or be-

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fore a single judge, is now heard. Said matter is argued by respective counsel, submitted and taken under advisement.

Sept. 18 This being the date heretofore fixed for trial before a three-judge court, all counsel are present in Chambers at 9:50 o'clock a. m. Plaintiffs' Motions for Leave to File First, Second, Third and Fourth Trial Amendments to First Amended Complaint are now heard, and said motions are argued by respective counsel and submitted. Subsequently, at 10:50 o'clock a. m., the parties and all counsel are present in open court, and the court announces a decision has been reached on the question of whether this case should be before a three-judge district court or before the single judge to whom it was originally assigned. The decision and order is now read by Honorable Charles M. Merrill and filed. Subsequently, at 1:30 o'clock p. m., all counsel are present in Chambers and the following proceedings are had before Honorable Arthur M. Davis; Upon avowal of counsel for plaintiffs of intention to seek writ of mandamus from the Supreme Court of the United States, it is ordered that the trial setting herein is vacated. Motion made by counsel for plaintiffs for temporary restraining order upon the entire record, including the previous hearing on motion for temporary restraining order. Said motion is submitted and taken under advisement and counsel are allowed 10 days after receipt of transcript to file memoranda.

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Sept. 18	28.	Enter and file Decision and Order that this matter does not present a case for a three judge court; that plaintiffs' motions for leave to amend first amended complaint are accepted by court as offers of proof without ruling thereon; that this court as now constituted may then proceed no further; and that upon the court's own motion, this cause proceed henceforth before the single judge to whom the case was originally assigned, as if this three-judge court had never convened. (Copy delivered to counsel). 9/18/62
Sept. 19	29.	File Plaintiffs' Praecipe for Transcript of Record in Triplicate.
Sept. 24	30.	File Plaintiffs' Notice of Appeal to the Supreme Court of the United States.
Sept. 25		Mail copy of Notice of Appeal to Attorney General, State of Arizona.
Sept. 28	31.	File Objections to what is Designated as Plaintiffs' Motion for Temporary Restraining Order pending Final Disposition of Case.
Oct. 8	32.	File Pltfs' Motion for Stay of Enforcement of State Statutes as construed and applied and for an injunction pending appeal.
Oct. 8	33.	File Defts' Addenda to Objections to pltfs' Motion for Temporary Restraining Order pending final disposition of case.
Oct. 8	34.	File Fred O. Wilson's Statement in support of Motion to Quash.
Oct. 8	35.	File John F. Taylor's Statement in support of Motion to Quash.
Oct. 8	36.	File Defts' Designation of Additional portions of the Record to the Supreme Court.

1962

Oct.	11	—	Order allow defts. to Oct. 22, 1962 to file memoranda on Pltfs' Motion to Stay.
Oct.	22	37.	File Defts' Motion to Quash or in the alternative to deny plaintiffs' Motion for Stay of Enforcement of State Statutes as construed and applied and for an Injunction pending appeal.
Oct.	23	38.	File Reporter's Transcript of Proceedings of a Pre-trial Conference; 9/17-18/62
Oct.	23	39.	File Reporter's Transcript of Proceedings held Sept. 18, 1962. (Decision).
Oct.	23	40.	File Reporter's Transcript of Proceedings held Sept. 18, 1962 (Pltfs' Motion for Temporary Restraining Order pending final disposition of case)
Nov.	14	41.	File Plaintiffs-appellants' Motion for Order Extending Time to Docket Case in the Supreme Court of the United States.
Nov.	16	42.	Enter and file Order Extending Time to Docket Case in the Supreme Court of the United States to and Including January 21, 1963. 11/16/62

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 11 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants,

vs.

PAUL FANNIN, et al.,

Appellees.

APPELLEES' MOTION TO DISMISS APPEAL FROM THREE-JUDGE COURT ORDER OF SEPTEMBER 18, 1962, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF IN SUPPORT OF MOTION

ROBERT W. PICKRELL
The Attorney General
State of Arizona
159 Capitol Building
Phoenix, Arizona
Counsel for Appellees

FRANK SAGARINO
Assistant Attorney General
State of Arizona
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants,

vs.

PAUL FANNIN, et al.,

Apellees.

MOTION TO DISMISS APPEAL

PAUL FANNIN, W. W. DICK, RICHARD A. HARVILL, LAWRENCE J. WALKUP, G. HOMER DURHAM, CHARLES BURTON, BESSIE KIDD BEST and WALDO M. DICUS, as Members of the State Board of Education of the State of Arizona, and Such Board, W. W. DICK, as Superintendent of Public Instruction of the State of Arizona, FRANK CROSBY, VERA MATTHEWS and A. L. PENROD, as Members of the Board of Trustees of Pinetop Elementary School, Pinetop, Arizona, and Such Board, appellees in the above entitled cause, move this Honorable Court to dismiss with costs the appeal of appellants from the Order of September 18, 1962, of the three-judge court in the United States District Court for the District of Arizona on the grounds that the appeal is not within the jurisdiction of this Honorable Court because the appeal was not taken in conformity to 28 U.S.C. § 1253 for the following reasons:

I.

The Order of September 18, 1962, was not an order granting or denying an injunction as required by 28 U.S.C. § 1253, which permits a statutory appeal from a decision of a three-judge court to this Honorable Court.

II.

The Order of September 18, 1962, did not dismiss appellants' case but directed the matter to be heard by the single judge as if the three-judge court had never convened.

III.

Appellants' case has not been heard on the merits as to the issues raised by the pleadings in the lower court.

Dated this ..... day of January, 1963.

ROBERT W. PICKRELL
The Attorney General
State of Arizona
159 Capitol Building
Phoenix, Arizona
Counsel for Appellees

FRANK SAGARINO
Assistant Attorney General
State of Arizona
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants

vs.

PAUL FANNIN, et al.,

Apellees

BRIEF IN SUPPORT OF MOTION TO DISMISS

The Order of September 18, 1962 reads as follows:

"As we understand the position of plaintiffs (through examination of the entire record before us, their briefs and oral argument,) it is that members of a local school board, acting under authority bestowed by state statutes, state-wide in their application to school boards, have violated constitutional rights of these plaintiffs. Such violation consisted of requiring these plaintiffs, as students, contrary to their religious beliefs and on penalty of expulsion, to stand while the national anthem was sung or played in school. This requirement was not imposed by statute or by administrative action of any state agency or officer other than the local school board itself, and had no application to any other school district.

As we read the decisions of the Supreme Court of

the United States this does not present a case for a three-judge court.

Ex parte Bransford, (1940), 310 U.S. 354

Wilentz v. Sovereign Camp (1939), 306 U.S. 573

Ex parte Public National Bank of New York (1928), 278 U.S. 101

Ex parte Collins (1928), 277 U.S. 565

See: *City of Cleveland v. U.S.* (1945), 323 U.S. 329

Plaintiffs have this day tendered four proposed amendments to the first amended complaint. Their motion for leave to amend in these respects is opposed by the defendants. Without ruling on these motions this Court has accepted them as offers of proof. We find nothing in them to change our views as here expressed.

This Court as now constituted may then proceed no further.

Accordingly, upon this Court's own motion, IT IS ORDERED that this case proceed henceforth before the single judge to whom the case was originally assigned, as if this three-judge court had never been convened.

Dated this 18th day of September, 1962.

CHARLES M. MERRILL
United States Circuit Judge
DAVE W. LING
United States District Judge
ARTHUR M. DAVIS
United States District Judge

(Endorsed)
FILED
SEPT. 18, 1962
WM. H. LOVELESS, *Clerk*
United States District Court
for the District of Arizona" (Tr. 11 [1-2])[1]

28 United States Code, Section 1253, reads as follows:

"Direct appeals from decisions of three-judge courts.

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.—June 25, 1948, ch. 646, 62 Stat. 928."

This case had on August 8, 1962, been set for trial on September 18, 1962. (Tr. 19 [2]) The three-judge court on September 18, 1962, upon examination of the entire record ordered the case to proceed before the Honorable Arthur M. Davis, United States District Judge, at 1:30 p.m. (Tr. 13 [1-3]) The trial setting of September 18, 1962, was vacated as counsel for appellants avowed that he intended to seek a writ of mandamus from this Honor-

[1] Reference numbers appearing within brackets preceded by "Tr." refer to pages of the typewritten transcript of record as certified by William H. Loveless, Clerk of the United States District Court for the District of Arizona.

able Court to compel the three-judge court to reconvene. (Tr. 19 [3]). A motion for leave to file petition for writ of mandamus and petition for writ of mandamus has been docketed in this Court under No. 823 Misc.

The Order of September 18, 1962, by the three-judge court from which appellants appeal to this Court is not an appealable order within the statutory requirement of 28 U.S.C. § 1253, as the order does not grant or deny an interlocutory or permanent injunction. The order cannot be deemed a final judgment as to the rights of the appellants because the order directs the case to be heard by a local district judge. Said order does not preclude appellants from prosecuting the case based upon the issues created by the pleadings. The only effect of the order was a determination based upon the record that the matters contained in the case were not properly within the scope of determination by a three-judge court. Appellants could have and still have their right to be heard on the merits before the local district court as to their claim for relief.

Where a three-judge court properly determines from the record that a suit is not triable by a three-judge tribunal and directs that the case be heard by a single district judge, direct appeal to this Court is not authorized by 28 U.S.C. § 1253, and appellants cannot contend that they are aggrieved by the order of the three-judge court.

American Insurance Co. v. Lucas, 314 U.S. 575 (1941)

California Water Service Co. v. City of Redding, 304 U.S. 252 (1938)

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386 (1934)

Rorick v. Board of Comm'rs of Everglades Drainage

Dist., et al., 307 U.S. 208 (1939)

Wilentz v. Sovereign Camp, W.O.W., 306 U.S. 573 (1939)

Respectfully submitted,

ROBERT W. PICKRELL
The Attorney General
State of Arizona
159 Capitol Building
Phoenix, Arizona
Counsel for Appellees

FRANK SAGARINO
Assistant Attorney General
State of Arizona
Of Counsel